United States Court of Appeals for the Ninth Circuit.

American Pipe and Construction Co., *Petitioner,* vs. Honorable Martin Pence, Chief United States District Judge, District of Hawaii, *Respondent,* and The State of California, et al., *Real Parties in Interest.* Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577, 22578 A-C.

[April 15, 1968]

On Appeal from the United States District Courts for the: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges

HAMLEY, Circuit Judge;

American Pipe and Construction Co. (American), petitioner in this proceeding in the nature of mandamus, is the sole remaining defendant in twenty-seven antitrust treble damage actions pending in five United States District Courts in California, Oregon and Washington. The actions were filed in late 1964 and early 1965 and, with subsequent interventions, now involve approximately three hundred plaintiffs who are the real parties in interest in this mandamus proceeding. Five additional defendants were named in the complaints, but all of them settled out of court. The complaints allege a single conspiracy to allocate and divide orders and territories and engage in collusive and rigged bidding for the sale of concrete and steel pipe, in violation of section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

Shortly after the commencement of these actions the Chief Judge of the United States Court of Appeals for the Ninth Judicial Circuit designated and assigned The Honorable Martin Pence, United States District Judge for the District of Hawaii, to hold a district court in each of the five districts, namely: Northern District of California, Central District of California, Southern District of California, District of Oregon and Western District of Washington. We are informed that the Chief Judge of each of these districts, or the district judge of such districts then having one or more of these cases under assignment, thereafter assigned, or transferred the assignment of, all twenty-seven cases to Judge Pence "for all further proceedings."

Beginning in March, 1965, Judge Pence supervised extensive pretrial proceedings and entered a number of pretrial orders, including Pretrial Order No. 15 which is involved in this proceeding. Identical pretrial orders have applied to all actions, and the parties have generally performed the ordered acts on a common, joint or cooperative basis. However, no order has been entered in the district courts consolidating the actions for any purpose.

On October 11, 1967, Judge Pence entered Pretrial Order No. 12 which American construed as providing, among other things, for three or more simultaneous trials before three district judges. On October 30, 1967, American filed in this court a motion for leave to file a petition for a writ in the nature of mandamus to review this provision of the October 12, 1967 order. The motion was denied by this court on December 1, 1967, and a motion for reconsideration was denied on January 9, 1968.

In the meantime, on November 27, 1967, Judge Pence entered Pretrial Order No. 14, paragraph S of which American construed as providing, among other things, for three or more simultaneous trials before three district judges. On December 26, 1967, American appealed from the Pretrial Order No. 14 which was filed in each of the twenty-seven cases. In proceedings had before Judge Pence on January 12, 1968, the district court decided that the appeals were a nullity and that, consequently, the district court retained jurisdiction to enter further orders.

On January 26, 1968, American filed a motion in this court for a stay of further district court proceedings pending disposition of the appeals. At the same time American moved for consolidation of the appeals. The appeals were consolidated, a temporary stay was entered by this court on January 29, 1968, and a hearing was set for February 5, 1968. Defendants, real parties in interest in this mandamus proceeding, then moved to dismiss the appeals.

On February 5, 1968, following a hearing on American's motions for a stay and defendants' motion to dismiss the appeals, this court entered an order: (1) vacating the order for a temporary stay, (2) providing that the proceeding shall be considered in the nature of mandamus, (3) staying the trials in the twenty-seven cases pending disposition of the mandamus proceeding, but providing that all other proceedings in the district courts may continue, (4) specifying an accelerated schedule for briefing in the mandamus proceeding, the final brief to be filed on March 4, 1968, and (5) passing to the merits, defendants' motion to dismiss the appeals.

On February 15, 1968, American filed its opening brief in this court, in which American challenged paragraph S of Pretrial Order No. 14,[1] on the following grounds: (1) it unreasonably requires substantially simultaneous trials of three or more cases in three of

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[1]Paragraph S of Pretrial Order No. 14, reads as follows:

"S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo [sic] Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:

"(1) The voir dire examination;

"(2) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

"(3) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

"(4) Jury instructions and special interrogatories;

"(5) Counsel's opening statements;

"(6) The days and hours of the week during which Court will be conducted;

"(7) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

"(8) Daily trial transcripts;

"(9) A current index of the trial record;

"(10) The handling of documentary evidence at trial;

"(11) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;

"(12) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

"(13) The parties' report on their attempts to stipulate as to facts;

"(14) Further pre-trial proceedings;

"(15) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

"(16) Possibility of settlement."

the five districts,[2] and (2) it directs the unauthorized impanelling, by Judge Pence, of a special multi-judge court with purported authority to make rulings by joint action of the three judges, which will affect the outcome of many trials.

Thereafter, on February 23, 1968, Judge Pence entered Pretrial Order No. 15, paragraph 26 of which covers the same subject-matter of, and supersedes paragraph S of Pretrial Order No. 14.[3] In their answering brief thereafter filed, the plaintiffs in the antitrust suits accordingly undertook to defend, not paragraph S of Pretrial Order No. 14, but paragraph 26 of Pretrial Order No. 15. Since then all of the parties have agreed that the proceeding before us should be re-

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[2]In the Western District of Washington, some of the cases are pending in the Northern Division and some in the Southern Division.

[3]Paragraph 26 of Pretrial Order No. 15, omitting subparagraphs (A) through (P), which are identical with subparagraphs (1) through (16) of paragraph S of Pretrial Order No. 14, reads as follows:

> "26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonzo [sic] Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered. . . ."

garded as bringing into question paragraph 26 of Pretrial Order No. 15 rather than paragraph S of superseded Pretrial Order No. 14.

On March 1, 1968, Judge Pence moved in this court for leave to file a brief, as amicus curiae, which brief was tendered with the motion. On March 12, 1968, this court entered an order redesignating the parties as they would be designated in a mandamus proceeding. Judge Pence was designated respondent, appellant American was redesignated petitioner, and appellee defendants were redesignated real parties in interest. The brief tendered by Judge Pence was, under this order, received as respondent's return in the mandamus proceeding and American was given until March 20, 1968 to file an answer to such return. The mandamus proceeding was argued before this court on April 10, 1968.

As stated above, one of American's objections to paragraph S of Pretrial Order No. 14 was that, as construed by American, it purported to set up a special three-judge court convened by Judge Pence, which special court would hold a pretrial conference on a specified date with all three judges presiding, and at which pretrial conference the three judges would act together in making rulings and entering orders which would be binding in all twenty-seven cases.

The paragraph in question of Pretrial Order No. 14 is clearly subject to such a construction. However we need not pass upon the legality of such a course of action, inasmuch as it was abandoned in superseding paragraph 26 of Pretrial Order No. 15. In the latter paragraph (see note 3), it is made clear that Judge Pence would preside at the pretrial conference, then scheduled for June 5, 1968, and would make all rulings

therein and orders resulting therefrom. The two other district judges, instead of being designated as presiding judges were to be "present" so that Judge Pence could consult with them.

We do not understand that American objects to the latter arrangement and, in any event, it is legally unobjectionable. Circumstances can be stated by reason of which an order must be set aside because there were too many judges on the bench. See *In re Webster*, 9 Cir., 363 F.2d 937. But this is not such a case.

In the pretrial conference scheduled for June 5, 1968, Judge Pence will not be called upon to make any determination of fact or law bearing upon the merits of the antitrust suits. The indications are that the other two district judges are to be assigned to try two or more of these cases. It was therefore appropriate that they be present at the scheduled pretrial conference to familiarize themselves with the procedural aspects of the case and to confer with Judge Pence in the formulation of trial and pretrial procedures which Judge Pence would prescribe for all the cases.

In the previous hearing before this court there was some argument to the effect that Judge Pence might not follow a legally permissible course in arranging for the transfer of some of the cases to other district judges. However, there is no reason at this time to assume that any transfer of assignments by Judge Pence to another district judge will not accord with the rules and orders of the respective district courts. See 28 U.S.C. § 137.

This brings us to American's principal objection to paragraph S of Pretrial Order No. 14, now superseded

by paragraph 26 of Pretrial Order No. 15. This objection is that the paragraph in question requires simultaneous or substantially overlapping trials of three or more of these actions in three districts. American argues that this will confront American with difficulties and burdens of such magnitude as to assure, in advance, that American will not have fair trials.

Paragraph 26 of Pretrial Order No. 26 expressly contemplates the trial of three or more of the twenty-seven cases in three overlapping trials in three districts. The extent of the overlapping is left for final determination at the June 5, 1968 pretrial conference. Paragraph 26 further provides that the first trial will commence no later than June 24, 1968, and that the succeeding trials will commence thereafter "at intervals of not less than two weeks."

Some of the parties have estimated that each trial, whether of a single case or of consolidated cases, will require not less than sixty days. This means that if the first three trials do not exceed sixty days each, and if the maximum amount of overlapping contemplated by paragraph 26 is ultimately sanctioned, the first and second trials will be in progress simultaneously for two weeks, then all three trials will be in progress simultaneously for four weeks, after which the second and third trials will be in progress simultaneously for two weeks. To the extent that the trials exceed sixty days in length the overlapping of trials would be augmented.

On the other hand, as paragraph 26 now reads, the amount of overlapping, as finally prescribed as a result of the June 5, 1968 pretrial conference, may turn out to be much less. Under paragraph 26 the succeed-

ing trials are to commence at intervals of "not less than" two weeks. But, upon further consideration, Judge Pence, in consultation with the other district judges, might well determine to restrict such overlapping to a very few days, or to eliminate it entirely and perhaps even provide an interval between trials. Moreover, if the further order to be entered on June 5, 1968 provides for substantially overlapping trials, such a provision will not be binding upon Judge Pence or any other district judge to whom Judge Pence may transfer some of the cases, since every federal trial judge always retains control of his calendar. Thus an initial requirement for overlapping trials will be subject to reconsideration by the individual judges up to the dates of trial.

Nor is there any basis for this court to determine now, or at any time prior to completion of the trials, that any overlapping of trials which may be ordered will be unreasonable to the extent of constituting an abuse of discretion; or that any such overlapping will in fact result in substantial prejudice to the point of rendering the trials unfair; or that a trial judge, confronted during trial with circumstances indicating a reasonable probability of prejudice by reason of overlapping trials will not adequately meet the problem through the granting of continuances, or otherwise.

In addition, should an unreasonable and potentially prejudicial amount of overlapping take place, American may nevertheless prevail at the trials, in which event it will not be aggrieved by any actual overlapping. And should American not prevail, it may appeal to this court, at which time the question of unreasonable and prejudicial overlapping will be subject to review on the basis of actual trial events. On the other hand, were

we to undertake such inquiry at this time it would have to be on the basis of the present widely varying predictions as to what may happen at the trials, and on the basis of our present necessarily incomplete information and understanding concerning the complex pretrial problems with which Judge Pence and his colleagues have been assiduously struggling for a long time.

These considerations lead us to conclude that although paragraph 26 of Pretrial Order No. 15 clearly contemplates overlapping trials to some extent, this is not a matter with which this court can properly concern itself prior to the appeals, if any, which may be taken from final judgments entered in these antitrust actions.

Accordingly, the application for a writ in the nature of mandamus, to forbid the calendaring of substantially overlapping trials in these antitrust suits, or to provide the district court with guidelines to be followed in calendaring the cases for trial, is denied. The stay order herein is vacated. The motion to dismiss the appeals is denied as moot.

United States District Court, Western District of Washington, Southern Division, District of Oregon, Northern District of California, Central District of California, Southern District of California.

State of Washington, et al., v. American Pipe & Construction Co., et al. C.A. No. 3157, W.D. Wash., S. Div.

State of Oregon, et al., v. American Pipe & Construction Co., et al., C.A. No. 65-266 and related pipe case in the D. of Oregon bearing C.A. No. 65-299.

The State of California, et al., v. American Pipe & Construction Co., et al. C.A. No. 43403 and related pipe cases in the N.D. of Calif. bearing C.A. Nos. 43406-43407, 43729, 43752-43754, and 45001.

The City of Los Angeles, et al., v. American Pipe & Construction Co., et al. C.A. No. 65-911 and related pipe cases in the C.D. of Calif. bearing C.A. Nos. 65-913, 65-914, 66-655 -66-659, and 66-1024.

City of San Diego, et al., v. American Pipe & Construction Co., et al. C.A. No. 3396 and related pipe cases in the S.D. of Calif. bearing C.A. Nos. 3525 and 3528.

PRETRIAL ORDER NO. 17

A pretrial conference having been held on May 22, 1968; counsel having been heard; and due deliberation having been given, it is hereby ORDERED severally in each of the above actions that:

1. This order bears the titles or court file numbers and relates solely to claims for relief in each of the above-captioned actions;

2. A duplicate of this order shall be filed in each of the following cases and shall have the same effect as an original hereof. The docket pages of each such action shall be deemed incorporated by reference in and form a part of, the docket pages of each of the above actions pending in the same district court. This order shall be incorporated by reference, and shall form a part of the court files, for all purposes in each such other action:

Western District of Washington, Southern Division:	Civil No. 3157
District of Oregon:	Civil No. 65-266
Central District of California:	Civil No. 65-911
Southern District of California:	Civil No. 3396-SD-C
Northern District of California:	Civil No. #43403

3. Reference herein to "plaintiffs" is solely to the plaintiff or plaintiffs named in each particular action to which this order applies, and reference herein to "defendants" is solely to the defendant or defendants who have heretofore been served or have appeared in such action.

4. Two copies of any motion, brief or other document filed in any of the above-captioned actions pursuant to the provisions of this order shall be marked "COPY" and promptly sent via air mail, bearing the date of filing, addressed as follows:

Honorable Martin Pence, Chief Judge
United States District Court
P. O. Box 19
Honolulu, Hawaii 96810

5. This order supercedes all previous orders of the court insofar as they may be inconsistent with the provisions hereof.

6. Plaintiffs' motion for leave to file a supplemental trial brief regarding interstate commerce (dated April 9, 1968) is herewith granted. Plaintiffs' Trial Brief Supplement Concerning Interstate Commerce, attached to said motion, shall hereby be deemed filed, and is made a part of plaintiffs' trial brief (filed on November 3, 1967).

7. On or before May 31, 1968, defendants shall file a detailed written supplemental trial brief containing separately numbered paragraphs and setting forth:

A. The facts which defendants expect to prove in rebuttal of plaintiffs' trial brief supplement concerning interstate commerce, distinguishing between those facts which defendants contend, on the basis of the answers, plaintiffs' brief or otherwise, are admitted and those which are contested;

B. The legal issues, contentions, and supporting authorities related to the defense of plaintiffs' supplemental brief on interstate commerce.

8. On or before May 31, 1968 defendant American Pipe & Construction Co. shall file a detailed written memorandum and offer of proof, containing separately numbered paragraphs, and setting forth the evidence defendant intends to offer at trial relating to the costs and/or profits or losses incurred by American, or any other producer of concrete or steel conduit pipe, in the manufacture of the products covered by the complaints herein. Defendant's memorandum and offer of proof should specifically include statements as to (A)

whether actual production costs are the costs which would have been incurred absent the alleged conspiracy, and (B) whether admission into evidence of American's cost and/or profit or loss data should be dependent upon the offer and admission into evidence of comparable data for one or more other concrete and/or steel conduit pipe manufacturers.

9. On or before August 16, 1968 plaintiffs shall file a detailed written response to American's offer of proof as provided by paragraph 8 hereof, containing separately numbered paragraphs and setting forth:

A. The facts which plaintiffs expect to prove in rebuttal of American's offer of proof concerning cost and/or profit or loss evidence, distinguishing between those facts which plaintiffs contend are admitted and those which are contested; and

B. The legal issues, contentions and supporting authorities related to defense of American's offer of proof.

10. On or before May 31, 1968 defendants shall designate those portions of any deposition which they expect to read into testimony at the trial, and shall file written objections to deposition testimony designated by plaintiffs pursuant to Pretrial Order No. 15.

11. On or before June 14, 1968, plaintiffs shall counter-designate those portions of any deposition which they expect to read into testimony at the trial in rebuttal of portions designated by defendants pursuant to paragraph 10 hereof, and shall file written objections on the margin of the deposition testimony designated by defendants pursuant to paragraph 10.

12. On or before June 21, 1968, plaintiffs and defendants shall file written objections to documentary evidence previously designated or identified for introduction at trial.

13. On or before June 26, 1968, defendants shall file written objections to plaintiffs' counter-designations of deposition testimony.

14. On or before July 1, 1968, plaintiffs and defendants shall file:

A. Witness lists, indicating whether each witness will be presented by live or deposition testimony;

B. Proposed questions for the *voir dire* examination;

C. Proposed instructions to the jury on the law of the case;

D. Proposed special interrogatories to the jury;

E. The court copies of designated deposition testimony containing each party's objections to said designated testimony written in short form in the margin opposite the relevant language;

F. Proposed summaries of the contentions of the parties to be read to the jury.

15. On or before July 1, 1968, plaintiffs and defendants shall file all requests for admissions of facts or of the genuineness of documents.

16. On or before June 10, 1968 defendants shall furnish plaintiffs with a computer print-out of the mechanical errors which defendants contend plaintiffs made in plaintiffs' economic study in the transfer of information from factory orders of manufacturers other

than American Pipe & Construction Co. to coding sheets.

17. On or before June 24, 1968 defendants shall file a statement which verifies or challenges (with all necessary explanation) that the computer programs employed in plaintiffs' economic study (A) accurately express plaintiffs' program logic, and (B) accurately implement that logic.

18. On or before July 1, 1968 the parties shall confer (with appropriate technical and expert personnel present) regarding the validity of (A) the corrections referred to in paragraph 16 hereof, and (B) any challenges to plaintiffs' logic and programming pursuant to paragraph 17 hereof.

19. On or before July 24, 1968 defendants shall file a detailed written statement, comparable to that required of plaintiffs by paragraph 20 of Pretrial Order No. 16, setting forth the economic, statistical and engineering theories employed by defendants in defense of plaintiffs' damage proof, stating separately each judgment, and the underlying reasons therefor, on which defendants will rely in rebutting plaintiffs' theory or in offering affirmative evidence.

20. On or before July 3, 1968 defendants shall have completed deposing Dr. Bayard Wheeler, one of plaintiffs' economic experts.

21. On or before July 24, 1968 defendants shall produce in Los Angeles, California, the results of all polls, samples, summaries, surveys or computer runs which they propose to offer into evidence at trial. Defendants shall further make available to plaintiffs duplicates of all raw data, work sheets and computer inputs and

outputs from which such polls, samples, summaries, surveys or computer runs have been prepared.

22. Failure to comply with the provisions of paragraph 21 hereof shall preclude defendants from introducing into evidence at trial the results of any polls, samples, summaries, surveys, computer runs or raw data, work sheets and computer inputs and outputs for which such failure has occurred.

23. On or before July 29, 1968 defendants shall make an oral explanation to plaintiffs' technical and expert computer personnel of all materials used in or generated by their economic study, and the methodology employed in implementing such study.

24. On or before August 30, 1968 plaintiffs shall have completed deposing defendants' economic experts.

25. On or before August 30, 1968 plaintiffs and defendants shall make available for inspection all visual aids representing materials produced pursuant to this and all prior pretrial orders for their respective cases in chief.

26. Any portion of the deposition testimony and any document which is not designated by the parties in accordance with this and all prior pretrial orders shall be deemed abandoned and withdrawn unless the court shall otherwise authorize in the interest of justice; *provided,* however, that this exclusion shall not apply to evidence introduced by one party which is relevant to the testimony of a live witness produced by the other party.

27. A pretrial conference is set for August 7, 1968 at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or

such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (A) select the case(s) for trial; (B) select the district(s) in which any such trial(s) will be held; (C) determine the judge to preside in any such district; (D) determine whether other cases pending in any such district should be consolidated for trial; (E) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of overlapping trials, with the first trial to commence no later than September 3, 1968, and with any succeeding trial to commence thereafter at intervals of not less than two weeks each; and (F) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

A. The *voir dire* examination;

B. The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

C. The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

D. Jury instructions and special interrogatories;

E. Counsels' opening statements;

F. The days and hours of the week during which court will be conducted;

G. Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

H. Daily trial transcripts;

I. A current index of the trial record;

J. The handling of documentary evidence at trial;

K. The scope of testimony of witnesses to be called at trial and possible use of narrative summaries or verbatim extracts;

M. The parties' report on their attempts to stipulate as to facts;

N. Further pretrial proceedings;

O. Rulings on objections to designated deposition testimony and documentary evidence, where possible;

P. Possibility of settlement.